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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 02/10/2011
RUTH WILLINGHAM,
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BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 09-0142
)
) DEPARTMENT B
Appellee,)
) **MEMORANDUM DECISION**
v.)
) (Not for Publication -
TROY HULL,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2007-006306-001 DT

The Honorable Silvia R. Arellano, Judge (Retired)

CONVICTIONS AND SENTENCES AFFIRMED

Thomas Horne, Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
By Stephen R. Collins, Deputy Public Defender
Attorneys for Appellant

J O H N S E N, Judge

¶1 Troy Hull timely filed this appeal in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), following his conviction on February 5, 2009 on one count of manslaughter, a Class 2 felony, and one count of endangerment/imminent death, a Class 6 felony. Hull's counsel has searched the record on appeal and found no arguable question of law that is not frivolous. See *Smith v. Robbins*, 528 U.S. 259 (2000); *Anders*, 386 U.S. 738; *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999).

¶2 Hull was given the opportunity to file a supplemental brief, but did not do so. Counsel now asks this court to search the record for fundamental error. He also advises that Hull has asked him to raise seven issues for our review: (1) Whether Hull's right to a speedy trial was violated; (2) whether the superior court's admission of a retrograde analysis of Hull's blood alcohol content was improper; (3) whether the prosecutor's comments during closing argument denied Hull a fair trial; (4) whether there was insufficient evidence to convict; (5) whether the admission of a phlebotomist's testimony was improper; (6) whether Hull's due process rights were violated because the State did not serve him a summons before arresting him the third time; and (7) whether his counsel was ineffective. After

reviewing the entire record and applicable law, we affirm Hull's convictions and sentences.

FACTS AND PROCEDURAL HISTORY

¶3 After several hours of drinking, Hull drove two of his friends from a bar early in the morning of December 4, 2003. While traveling at 80 or more miles per hour in a 40 mile-per-hour zone, Hull failed to negotiate a curve.¹ His vehicle careened out of control, flew off the roadway into a parking lot, plowed into a concrete pillar, spun into a cargo van, flipped onto its roof, skidded and finally burst into flames. The car's seatbelts kept its occupants suspended upside down in the car. Hull and Jennifer H. were able to escape the vehicle, but John F. suffered a concussion, vomited and died of asphyxiation within three minutes following the crash. Had John F. been either upright or conscious, he most likely would have survived relatively unscathed.

¶4 Approximately 43 minutes after the crash, a hospital phlebotomist drew Hull's blood, and a test showed his blood alcohol content was .181. Pursuant to a search warrant, a phlebotomist drew another sample at 2:29 a.m., two hours and 22

¹ Upon review, we view the facts in the light most favorable to sustaining the jury's verdicts and resolve all inferences against Hull. *State v. Fontes*, 195 Ariz. 229, 230, ¶ 2, 986 P.2d 897, 898 (App. 1998).

minutes after the crash, which showed a blood alcohol level of .133.

¶15 In September 2004, shortly before the date of trial, the State requested a continuance due to a witness's personal emergency. The superior court denied the continuance and at the State's request, dismissed charges against Hull without prejudice. No longer being actively prosecuted, Hull relocated to Illinois. Three months after the dismissal, the State sought and received a second indictment. More than a year after that, Hull was located and arrested in Illinois. Upon motion, in October 2006, the superior court dismissed the charges without prejudice for violation of Hull's right to a speedy trial.

¶16 The State sought and obtained a third indictment in May 2007. As directed by the court, the State sent a notice of summons via certified mail to Hull's attorney. Hull did not appear at a scheduled hearing a few weeks later, but the State took no further action to follow up on the service of process. After learning that Hull's defense attorney had failed to pick up the summons six months later, the State petitioned for and received an arrest warrant. Hull was taken into custody three months later, on December 28, 2007.

¶17 Hull filed a "Motion to Dismiss for State's Failure to Exercise Due Diligence," in which he argued that the State

failed to act diligently in pursuing the prosecution and that he suffered prejudice as a result of the delay. The court denied his motion.

¶18 A jury found Hull guilty of manslaughter and endangerment/imminent death and determined that both crimes were dangerous. After the jury found one aggravating circumstance applicable to each crime, the superior court sentenced Hull to aggravated terms of 12 years and three years, to run concurrently.

¶19 Hull timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2010) and -4033(A)(1) (2010).²

DISCUSSION

A. Fundamental Error Review.

¶10 The record reflects that Hull received a fair trial. He was represented by counsel at all stages of the proceedings against him and was present at all critical stages.³ The court held appropriate pretrial hearings. The State presented both direct and circumstantial evidence sufficient to allow the jury

² Absent material revisions after the date of an alleged offense, we cite a statute's current version.

³ Hull's counsel waived his presence for argument on a motion to dismiss and for a trial management conference.

to convict.⁴ The jury was properly comprised of eight members with two alternates. The court properly instructed the jury on the elements of the charges, the State's burden of proof and the necessity of a unanimous verdict. The jury returned a unanimous verdict, which was confirmed by juror polling. The court received and considered a presentence report and addressed its contents during the sentencing hearing and imposed legal sentences on the crimes of which Hull was convicted.

B. Issues Raised by Hull.

¶11 Hull first argues his speedy trial rights were violated.⁵ To obtain relief for a purported violation of speedy trial rights, a defendant must demonstrate actual and substantial prejudice. *State v. Broughton*, 156 Ariz. 394, 397-98, 752 P.2d 483, 486-87 (1988) (pre-indictment delay resulting in witness memory loss); *State v. Spreitz*, 190 Ariz. 129, 139-40, 945 P.2d 1260, 1270-71 (1997) (citing *Barker v. Wingo*, 407 U.S. 514, 530-32 (1972)) (five-year post-indictment delay).

¶12 Hull did not argue in the superior court that the State intentionally delayed to gain an advantage. Instead, he argued only that had the case gone to trial shortly after the crash, a witness would have testified that Jennifer H., not

⁵ The offenses occurred on December 4, 2003, the State filed its third and final indictment on May 8, 2007, and Hull was convicted on November 3, 2008.

Hull, was driving the vehicle. According to Hull, however, by the time of trial in 2008, the witness could no longer be certain who was driving the car. According to Hull, this witness's story was "the very heart and soul of the Defense's case." Nonetheless, the witness did not have first-hand knowledge of the events; he was not in the car at the time of the crash, nor was he at the scene of the crash. Indeed, all witnesses who were at the scene testified that Hull was in the driver's seat and Jennifer H. crawled out of the vehicle from the back seat.

¶13 Moreover, the loss of a witness's memory is insufficient, by itself, to prove prejudice. *Broughton*, 156 Ariz. at 398, 752 P.2d at 487 (citations omitted). To prove prejudice, Hull must show that his defense was harmed by the delay and that there was a reasonable probability that the verdict would have been different if the delay had not occurred. *State v. Vasko*, 193 Ariz. 142, 147, ¶ 22, 971 P.2d 189, 194 (App. 1998). On this record, Hull is unable to do so.

¶14 Additionally, to alleviate any concern over potential prejudice to Hull, the State agreed to stipulate that the witness originally had said that Jennifer H. was the group's designated driver and that she was driving, not Hull, on the morning in question. The defense refused the offered

stipulation. Nonetheless, the superior court granted defense counsel permission to use the "stipulation . . . reflecting what [the witness] told defense counsel."

¶15 For these reasons, Hull failed to show sufficient actual prejudice to justify a reversal.

¶16 Second, Hull argues that the superior court erred by allowing a retrograde blood alcohol analysis to be admitted into evidence because the most relevant blood alcohol content would have been at the moment of the crash. In *State ex rel. Romley v. Brown*, 168 Ariz. 481, 483, 815 P.2d 408, 410 (App. 1991), this court held that a blood alcohol analysis need not relate back to the precise time of the alleged offense. The court therefore did not abuse its discretion in allowing the retrograde analysis.

¶17 Hull next argues the prosecutor impermissibly drew attention to the fact that he did not testify at trial. Absent actual prejudice, prosecutorial misconduct is harmless error. *State v. Hughes*, 193 Ariz. 72, 80, ¶ 32, 969 P.2d 1184, 1192 (1998). We will not reverse a conviction based on prosecutorial misconduct unless the conduct is "so pronounced and persistent that it permeates the entire atmosphere of the trial." *State v. Lee*, 189 Ariz. 608, 616, 944 P.2d 1222, 1230 (1997) (quoting *State v. Atwood*, 171 Ariz. 576, 611, 832 P.2d 593, 628 (1992)).

¶18 Hull has not alleged that the prosecutor engaged in persistent or pervasive misconduct; he references only one brief comment during closing arguments.⁶ "Under both Arizona and Federal law the test to judge impermissible comment upon a defendant's assertion of his fifth amendment right not to testify is 'whether the language used was manifestly intended or was of such a character that the jury would naturally and necessarily take it to be a comment on the failure to testify.'" *State v. Fuller*, 143 Ariz. 571, 575, 694 P.2d 1185, 1189 (1985) (citations omitted). "The prosecutor may properly comment upon the defendant's failure to present exculpatory evidence, so long as the comment is not phrased to call attention to the defendant's own failure to testify." *Id.* We conclude the prosecutor's comment was not impermissible; nor does the record indicate the verdict would have been different had the comment not been made.

¶19 Hull also argues that a phlebotomist's testimony lacked foundation. The phlebotomist testified that she used a swab from the blood collection kit to clean Hull's skin before drawing his blood, but could not remember what type of swab it

⁶ During closing arguments, the prosecutor posed a rhetorical question to the jury: "Did the defendant talk to you about anything that broke up the chain of events, that the superseding cause broke the causal chain? No, he didn't. He just said, 'well, this is a really weird way to die.'" "

was. Another witness, the criminalist who performed the blood alcohol content analysis on the specimen, testified that the kit used to draw Hull's blood contained a povidone swab, not an alcohol swab. In light of the criminalist's testimony regarding the blood draw kit, the phlebotomist's memory lapse goes to the weight to be accorded her testimony, not its admissibility. See *Siegrist v. Carrillo*, 112 Ariz. 218, 221, 540 P.2d 690, 693 (1975) (testimony regarding standard procedures for handling blood samples, and a lack of evidence indicating deviation from those procedures, sufficient to overcome foundation concerns regarding admissibility of blood alcohol evidence).

¶20 Hull next argues he was denied due process because the State re-arrested him after his defense counsel failed to pick up the summons sent via certified mail. We disagree.

¶21 Absent good cause to issue an arrest warrant, issuance of summons is preferred. Ariz. R. Crim. P. 3.1(b). In this case, the State did attempt to serve Hull's defense counsel with summons via certified mail. Hull's counsel failed to pick up the summons and Hull failed to appear at his arraignment hearing. Without deciding whether the State should have exercised greater efforts to serve Hull with a summons, good cause existed to issue a warrant.

¶22 Finally, Hull argues his counsel was ineffective. Claims of ineffective assistance of counsel cannot be raised on direct appeal. *State v. Spreitz*, 202 Ariz. 1, 3, ¶ 9, 39 P.3d 525, 527 (2002) (ineffective assistance of counsel claims must be raised in Arizona Rule of Criminal Procedure 32 proceedings). We therefore do not reach the merits of the argument.

CONCLUSION

¶23 We have reviewed the entire record for reversible error and find none. *See Leon*, 104 Ariz. at 300, 451 P.2d at 881.

¶24 After the filing of this decision, defense counsel's obligations in this appeal have ended. Defense counsel need do no more than inform Hull of the outcome of this appeal and his future options, unless, upon review, counsel finds "an issue appropriate for submission" to the Arizona Supreme Court by petition for review. *See State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). On the court's own motion, Hull has 30 days from the date of this decision to proceed, if he wishes, with a *pro per* motion for reconsideration. Hull has 30 days from the date of this decision to proceed, if he wishes, with a *pro per* petition for review.

/s/

DIANE M. JOHNSEN, Presiding Judge

CONCURRING:

/s/

MICHAEL J. BROWN, Judge

/s/

JOHN C. GEMMILL, Judge